Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLOTTE BERGENDAHL,
ADMINISTRATRIX OF THE ESTATE OF MARCY M. BERGENDAHL,
AND CHARLOTTE BERGENDAHL, INDIVIDUALLY

Petitioners

v.

MASSACHUSETTS ELECTRIC COMPANY

Respondent

On Petition of Writ Of Certiorari
To The Massachusetts Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, in a negligent death case, the Plaintiff was wrongfully deprived of her right to a trial by jury guaranteed her by the 7th Amendment of the United States Constitution and Article XV of the Constitution of the Commonwealth of Massachusetts.

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OPINIONS BELOW

The Massachusetts Appeals Court decided this case and their opinion appears at Appendix A.

A timely petition for Further Appellate Review was filed with the Supreme Judicial Court of Massachusetts and was Denied on January 25, 1999; a copy of the order denying Further Appellate Review appears at Appendix C.

A Motion For Reconsideration of the denial of Further Appellate Review was timely filed with the Supreme Judicial Court of Massachusetts and was denied on February 22, 1999, and appears at Appendix D.

JURISDICTION

This case presents a Federal Constitutional question as to whether or not the Plaintiff has been denied her Constitutional Right To A Trial By Jury, which is guaranteed under the 7th Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

7th Amendment to the Constitution of The United States of America:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Article XV of the Massachusetts Constitution:

"In all controversies concerning property,and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this measure of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relates to mariner's wages, the legislature shall hereafter find it necessary to alter it."

* * *

Massachusetts Rule of Civil Procedure #1

" Scope of the Rules -- They shall be construed to secure the just, speedy, and inexpensive determination of every action."

STATEMENT OF THE CASE

On or about August 22, 1992 , Marcy Bergendahl, 27 years old, made her weekly Saturday morning visit to her parents home in Lynn, Massachusetts. Her father was involved in painting the house in preparation for Marcy's wedding.

At some point Marcy went out to the front lawn where her fiancee, her brother, and her father were already involved in moving an aluminum ladder. Marcy began to tease her younger brother, Karl, about his baldness which had resulted from recent chemotherapy treatments. As she rubbed his head, laughing, all were thrown to the ground. The ladder had touched a wire of the Massachusetts Electric Company which was uninsulated and carrying 8,000 volts of deadly electrical charge. Marcy was rushed to the hospital where she died five days later. The cause of death was electrocution.

A Complaint And Request For Trial By Jury was filed in the

Essex County Superior Court (Docket No.: 940655 B) on March 25, 1994. (See Appendix E.) Massachusetts Electric filed a Motion For Summary Judgement (Mass.R.Civ.P.56). Summary Judgement was entered by the Superior Court of Massachusetts, after hearing, in favor of the Massachusetts Electric Company despite the Plaintiff's strong opposition which was supported by Massachusetts case law and the Affidavit of Karl Bergendahl (See Appendix F.) The Trial Court disposed of the case with a one-word decision, "Allowed." (See Appendix B.) A Motion for Reconsideration, and a Motion for Rulings of Law and Findings of Fact both resulted, without hearing, in a one word decision, "Denied." (See Appendix G. & H.)

Plaintiff took an Appeal from this decision. The Appeals Court of Massachusetts affirmed the one-word decision of the Trial Court with an 18 page decision. (See Appendix A.)The Appeals Court erroneously proffers that since Massachusetts Electric complied with standards set by the National Electrical Safety Code, that they are are absolved of any claim of negligence on their part. It is quite clear, also, that most of the general public is unaware that overhead power lines are uninsulated, and therefore, the Defendant breached its duty to warn, which is alleged in the Complaint and Request For A Trial By Jury. The Supreme Judicial Court of Massachusetts denied Further Appellate Review, (See Appendix C.) and also denied Reconsideration of their Denial of Further Appellate Review.(See Appendix D.)

The Plaintiff presently Petitions this Supreme Court of the United States to grant a Writ of Certiorari claiming that she has been denied her right to a trial by jury.

REASONS FOR GRANTING THE PETITION

The very essence of a trial by jury is to protect the Plaintiff, as much as possible, from the corruption, undue influence, and abuse of power that naturally develops in any system of man-made

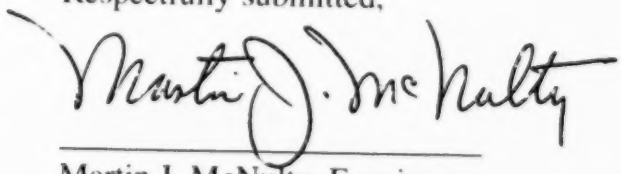
government. This case particularly showcases an enormous discrepancy in political power: a claim brought by the family of a 27 year old decedent against the Number One corporate citizen of Massachusetts, The Massachusetts Electric Company. A trial by jury in this case is strongly supported by well established case law and the Affidavit of Karl Bergendahl. (See Appendix F.) Plaintiff's Complaint & Request For Trial By Jury (See Appendix E.) raises numerous issues of fact that are appropriate for determination by a jury.

Whether Marcy Bergendahl's death was caused by the negligence of the Massachusetts Electric Company is a question that must be decided by a jury. Any attempt to vitiate this sacred right must fail.

CONCLUSION

Petition For Writ of Certiorari should be granted.

Respectfully submitted,



Martin J. McNulty, Esquire
Lynn, Essex County, Massachusetts

Dated: May 10, 1999

COMMONWEALTH OF MASSACHUSETTS

Appeals Court for the Commonwealth

At Boston,

In the case no. 97-P-1317

CHARLOTTE BERGENDAHL

vs.

MASSACHUSETTS ELECTRIC COMPANY.

pending in the Superior

Court for the County of Essex

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,

s/Lena M. Wong

_____, Asst. Clerk

Date November 13, 1998

NOTE:

The original of the within rescript will issue in due course, pursuent to M.R.A.P.23

APPEALS COURT

Appendix A.

CHARLOTTE BERGENDAHL[1] vs. MASSACHUSETTS ELECTRIC
COMPANY.

No. 97-P-1317.

Essex. June 11, 1998. - November 13, 1998.

Present: Brown, Greenberg, & Laurence, JJ.

Practice Civil, Summary judgment, Negligence, Electricity, Standard of care, Duty to warn, Foreseeability of harm.

Civil action commenced in the Superior Court Department on March 25, 1994.

The case was heard by Nancy S. Merrick, J., on a motion for summary judgment.

Martin J. McNulty (Dana A. Curhan with him) for the plaintiff.

Nicholas J. DeNitto for the defendant.

LAURENCE, J. This matter arises from the accidental death of Marcy Bergendahl, who was electrocuted when an aluminum ladder she was helping to move touched a live 8,000 volt power line owned by Massachusetts Electric Company (MEC). Plaintiff Charlotte Bergendahl, administratrix of her daughter's estate, brought suit against MEC, seeking recovery grounded on the contention that MEC's negligence with respect to the power line caused Marcy's death. A Superior Court judge dismissed the complaint on MEC's motion for summary judgment.

The facts, essentially undisputed, are as follows. On August 22, 1992, Marcy was visiting her family at their home in Lynn. At the

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[1] Individually and as administratrix

time, her father, Arvid Bergendahl, was outside painting the exterior of his house. Arvid came inside and asked for help moving the ladder he was using. Marcy, her brother Karl, and her fiancee, William Hartman, went outside to assist Arvid. The ladder Arvid was using was an aluminum extension ladder, twenty feet long in a closed position and forty feet long when fully extended, which had been extended to at least thirty-two feet. Affixed to the ladder was a warning label that it would conduct electricity in the event of contact with a live wire.

At the curb in front of the house, between sixteen and eighteen feet from the porch, were two utility poles carrying telephone, cable television, and electric wires. The telephone wires were approximately twenty feet from the ground; the cable television wires were approximately twenty-one and one-half feet high; and two sets of electric wires owned by MEC were approximately twenty-five and thirty feet, respectively, above the ground, at the top of the poles. The topmost electric wires were not insulated. The vertical and horizontal locations of the wires and their uninsulated condition were in compliance with the applicable requirements of the National Electric Safety Code. No trees or other objects masked or obstructed the overhead wires, which were in plain view from the Bergendahl house and from the adjacent public sidewalk underneath the wires, where the foot of the ladder was positioned at the time of the accident.

Marcy was touching either the ladder or her brother, who was holding the ladder, when it came into contact with the topmost electric wires. All four persons were thrown to the ground, but only Marcy was injured severely enough to require hospitalization. She died five days after the incident as a result of her electrocution.

Following completion of discovery by both parties, MEC moved for summary judgment. It contended, on the basis of the undisputed facts set forth above, that Charlotte had failed to present any evidence to show MEC was negligent or that any negligent act or omission on its part had proximately caused Marcy's death.

MEC particularly argued that, as matter of law, it had no duty to insulate the wires involved in the accident or to warn Marcy or the others who were moving the ladder. MEC stressed the fact of its full compliance with applicable code requirements, the well-known dangers of electric wires, and the plain and obvious nature of the wires with which the extended ladder had come in contact.

The plaintiff opposed MEC's motion by asserting the existence of a genuine issue of material fact that must be determined by a jury: [namely,] whether or not Marcy . . . was one to whom . . . [MEC] owed a duty to insulate its wires." She also argued that in determining such 'fact in accordance with Massachusetts case law the jury must weigh whether or not she was a member of 'the general public." The only evidence presented in support of the opposition was Karl Bergendahl's affidavit. It merely averred that Marcy was not actually moving the ladder at the time of the accident but only standing beside him, joking with him while rubbing his bald head. The legal argument for the plaintiff's opposition centered on the claim that, under Massachusetts law, electric companies had a duty to members of the general public to insulate their wires; that failure to insulate would warrant a finding of negligence in favor of a member of the general public who could reasonably be expected to come in contact with those wires; and that it was a jury question whether Marcy was a member of the general public[2] (At no time did the plaintiff allege or argue that the fatal power lines were in any way defective or poorly maintained.)

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[2] The submission of Karl Bergendahl's affidavit in support of the opposition to the summary judgment motion was an effort to portray Marcy as a mere bystander not actively involved in moving the ladder, presumably thereby enhancing her status as a "member of the general public" for purposes of the plaintiff's legal argument. (The compiaint and the plaintiff's answers to MEC's interrogatories had stated that Marcy had been helping to move the ladder.) We agree with MEC that the affidavit was irrelevant, because the exact manner in which Marcy came in contact with the ladder or the electricity that flowed through it had no bearing on whether MEC owed her a duty or was in breach of that duty, and was therefore a nonmaterial fact. In this connection, this court has repeatedly frowned upon efforts to create disputed issues of fact, in order to preclude summary judgment, by submitting affidavits that contradict a party's previous statements or admissions made during discovery. O'Brien v. Analog Devices, Inc., 34 Mass. App. Ct. 905, 906 (1993). Morrell v. Precise Engr., Inc., 36 Mass. App. Ct. 935, 937 (1994). Geller v. Allied-Lyons PLC, 42 Mass. App. Ct. 120, 121 n.2 (1997).

At the hearing on MEC's summary judgment motion, the court's questions reflected a particular concern with the issue whether any duty to insulate existed, particularly in light of MEC's compliance with code requirements. The plaintiff elaborated upon her legal position at the hearing by contending that whether such a duty existed was itself a jury question, in addition to the issues whether the duty was owed to the decedent and whether it was adequately discharged in the circumstances. Soon after the hearing, the court, without opinion, allowed MEC's motion and dismissed the complaint. We conclude that the court's decision was correct on the present record and affirm.[5]

Summary judgment shall be granted where there are no genuine issues as to any material fact and where the moving party is entitled to judgment as matter of law. Community Natl. Bank v. Dawes, 369 Mass. 550, 553 (1976). Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983), Mass.R.Civ.P. S6(c), 365 Mass. 824 (1974). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue "and [further,] that the moving party is entitled to judgment as a matter of law," Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of. a triable issue either by submitting affirmative evidence that negates an essential element of the opponent's case or by demonstrating that proof of that element is unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). Accord Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991), "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact in order to defeat [the] motion." Pederson, 404 Mass. at 17, "[W]hen a motion for summary judgment is made and properly supported, the non-moving party may not simply rest on pleadings, 'but his response, by affidavits or as otherwise

[5] If legally correct, the court's unexplained decision may be affirmed on any sound basis. Doeblin v. Tinkham Dev. CorP., 7 Mass. App. ct. 720, 722 (1979).

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'" Correllas v. Viveiros, 410 Mass. 314, 317 (1991), quoting from Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974). Conflicts in the summary judgment materials and all logically permissible inferences are made in the motion opponent's favor, Willitts v. Roman Catholic Archbishop of Boston, 411 Mass. 202, 203 (1991); but mere assertions of the existence of disputed facts without evidentiary support cannot defeat the summary judgment motion. LaLonde v. Eissner, 405 Mass. 207, 209 (1989). The plaintiff failed to satisfy her burden in opposing; MEC's summary judgment motion under these standards. Most critically, MEC's motion presented evidence that the placement of its electric wires in relation to the plaintiff's residence and the sidewalk and the ground satisfied the applicable industry code, which did not require such wires to be insulated. Such a proffer constituted evidence that the defendant was acting in accord with industry practice and consequently not negligent in the circumstances. See Corthell v. Great Atl. & Pac. Tea Co., 291 Mass. 242, 243-244 (1935); Clough v. New England Tel. & Tel. Co., 342 Mass. 31, 35-36 (1961); Upham v. Chateau de Ville Dinner Theatre, Inc., 380 Mass. 350, 353-354 (1980); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. 131, 139-140, cert. denied, 474 U.S. 920 (1985).[4] Additionally, the materials supporting MEC's motion established that the wires were not hidden or obscured, but rather unobstructed and openly visible from the decedent's perspective. That combined evidence tended to "negate an essential element of the opponent's case," namely, that MEC was negligent with respect to the location and condition of the wires. See Restatement (Second) of Torts §

[4] Compare 220 Code Mass. Regs. § 125.10(1)(c) (1993) (requiring electric transmission lines to be constructed "according to accepted good practice. . . ."); and § 125.23(3) (1993) (requiring a vertical clearance of at least twenty-eight feet for electric wires running above streets, driveways, and areas accessible to residences). In this connection, we are also aware of no statute or regulation that obligates an electric company to insulate its high voltage transmission lines, except "at all points of attachment" to supporting structures (such as poles) and where a wire "enters a building." G. L. c. 166, § 30. 220 Code Mass. Regs. § 125.26 (1993). See G. L. c. 166, § 34, requiring insulation, to protect the public, of "[p]oles and other structures used ta support lines for the transmission of electricity," but not of the lines themselves.

281(b) (1965). To avoid losing the motion, the plaintiff was obligated to respond by showing with admissible evidence the existence of a dispute as to the fact of MEC's negligence. Godbout v. Cousens, 396 Mass. 254, 261 (1985).

The plaintiff, however, produced no such admissible evidence -- indeed, no evidence of any sort -- in response or rebuttal to the motion, except for Karl's misguided affidavit focusing entirely on Marcy's irrelevant physical relationship to the ladder. On that state of the record, the court could justifiably rule in favor of MEC, notwithstanding customary judicial reluctance to grant summary judgment in negligence cases, see Manning v. Nobile, 411 Mass. 382, 388 (1991), because "no rational view of the evidence warrant[ed] a finding that the defendant was negligent." See Young v. Atlantic Richfield Co., 400 Mass. 837, 841-842 (1987), cert. denied, 484 U.S. 1066 (1988) (no basis for negligence liability when the "risk is of such a nature that it would be obvious to persons of average intelligence"); Diodato v. Grove Mfg. Co., Nos. 90-12291-2, 9012880-N-2 (D. Mass. Aug. 29, 1991) (no basis for negligence liability with respect to "a danger as open and obvious as electrical powerlines").

The authorities cited earlier for the proposition that proof of compliance with industry practice militates against a finding of negligence recognize that such evidence is not conclusive upon the issue and can be overcome by countervailing relevant evidence from which a jury could find negligence notwithstanding conformity with industry usage. It is, however, a plaintiff's burden to bring forward such evidence, at the peril of losing the summary judgment battle and thus the litigation war. Compare Corthell v. Great Atl. & Pac. Tea Co., 291 Mass. at 243-244 (plaintiff produced no evidence that defendant had reason to anticipate that the shoe the plaintiff was wearing would cause her to be in danger of injuring herself in defendant's store); Clough v. New England Tel. & Tel., 342 Mass. at 36 (plaintiffs produced no evidence that defendant had reason to anticipate that anyone would be working in proximity to its wires); Gelinas v. New England Power Co., 359

Mass. 119, 125 (1971) (evidence showing that defendant knew individuals such as plaintiff were working close to its live wires, had in fact taken some measures to reduce the risk of those workers coming in contact with the wires, and knew that its wires were of such an age that they might be worn out and dangle down, precluded a defendant's directed verdict); Upham v. Chateau de Ville Dinner Theatre, Inc., 380 Mass. at 355-356 (plaintiff's intended factual presentation showing that defendant had been put on notice that a group of elderly persons, including the plaintiff, would be in attendance at its theatre, so that its semidark lighting customarily found in dinner theaters might be anticipated to be insufficient for such patrons to be able to negotiate the steps, prevented a directed verdict for defendant after plaintiff's opening); MacDonald v. Ortho Pharmaceutical Corp., 394 Mass. at 140-141 (defendant's warning booklet mentioning danger of "abnormal blood clotting from use of its medication, though in compliance with government requirements, was insufficient to avoid negligence liability in the face of evidence that the failure to mention specifically the risk of "stroke" or of permanent disablement would mislead the average consumer as to the true nature of the dangers involved).

If such rebutting evidence in the plaintiff's favor existed, it is reasonable to assume that it would have been uncovered and produced in the two and one-half years between the filing of the complaint and the filing of the summary judgment motion. Alternatively, if the plaintiff had averred that, for good reason, facts essential to defeat the motion were not yet available but could be presented by affidavit if given additional time, she could have moved therefor under Mass.R.Civ.P. 56(f), 365 Mass. 825 (1974), but she did not. It is particularly noteworthy that the plaintiff submitted no affidavits, presumably readily available from the survivors of the accident, contradicting MEC's evidence that the electric wires were in plain view; or asserting that those involved were unaware of the presence of the electric wires in front of their house; or the possibility that such wires, if they were aware of them, might be uninsulated; or the risks of touching or coming near

such wires; or the risks associated with placing ladders of the type being used near electric wires.

The plaintiff seeks to avoid the consequences of her failure to challenge the summary judgment motion with countervailing evidentiary materials by arguing, as she did below, that under Massachusetts law electric companies have a duty to insulate their wires -- notwithstanding contrary industry practice -- and that the failure to insulate warrants a finding of negligence, or at least makes it a jury question. All of the authorities she relies on, however, are distinguishable. In each case, evidence existed in the record -- unlike the situation here --establishing that the defendant electric company was or should have been aware of the fact that individuals similarly situated to the plaintiff would be or had been working near the live wires. It was only on that basis that the court in each case raised a duty to insulate and left it to the jury to determine whether the duty had been properly discharged. See McCrea v. Beverly Gas & Elec. Co., 216 Mass. 495, 498 (1914) (men were required by statute to work in trees to control moths and defendant knew of such work); Philbin v. Marlborough Elec. Co., 218 Mass. 394, 396 (1914) (same); Rasmussen v. Fitchburg Gas & Elec. Light Co., 343 Mass. 515, 517 (1962) (evidence showed that various persons had in the past strung banners close to defendant's live wires, so that it should have anticipated that similar activity, which plaintiff had engaged in, might recur); Burr v. Massachusetts Elec. Co., 356 Mass. 144, 147 (1969) (stating in dictum that "in certain circumstances the failure to insulate may warrant a finding of negligence" but citing as the only authority for that proposition the three prior distinguishable cases). Contrast Urban v. Central Mass. Elec. Co., 301 Mass. 519, 523. (1938) (no obligation on an electric company to insulate wires on top of a pole located in a playground when no evidence indicated that defendant knew or had reason to know that children would be likely to climb the pole or otherwise come near the wires); Gelinas v. New England Power Co., 359 Mass. at 124 (an electric company's duty is "to exercise ordinary prudence and care in the maintenance and use of its power line," a determination of which depends on "the facts of each

case."[5]

The plaintiff cites no Massachusetts case, and we are aware of none, that imposes an unconditional duty on an electric company to insulate its wires in all circumstances. In any event, the issue of the existence of such a duty as the plaintiff avows is a question of law for the court, not a question of fact for the jury. See Schofield v. Merrill, 386 Mass. 244, 248-249 (1982); Davis v. Westwood Group, 420 Mass. 739, 742-743 (1995), and cases cited; Prosser & Keeton, Torts § 37, at 236 (5th ed. 1984). To the extent the judge may have ruled against the plaintiff because he was unconvinced that such an unconditional duty to insulate existed in Massachusetts law, the plaintiff has failed to persuade us that the ruling was legally erroneous.

The plaintiff advances an additional contention on appeal not made to the court below: that MEC had "a duty to warn of the dangers of electrical hazards," so that the jury should have been allowed to determine "whether it adequately discharged that duty." There is no merit to this argument, even setting aside the facts that (a) parties are not permitted to raise for the first time on appeal

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[5]The plaintiff contends that under Massachusetts law an electric company's duty to insulate arises because several decisions have recognized that "inasmuch as electricity is a highly dangerous force, those employing it are properly held to a correspondingly high degree of care in its use," Gelinas v. New England Power Co., 359 Mass. at 124, a recognition that requires (so the plaintiff asserts) a finding of negligence for failure to insulate when "the victim of the accident was a member of the general public," Burr v. Massachusetts Elec. Co., 356 Mass. at 147, which Marcy was. As discussed above, however, the rationale for liability in the cases relied on by the plaintiff was not whether the victim was a "member of the general public," but whether "in the exercise of reasonable care [the defendant] should have anticipated that human beings would be directly or indirectly in contact with its charged wires." Rasmussen v. Fitchburg Gas & Elec. Light Co., 343 Mass. at 519. Gelinas, notwithstanding the quoted observation, relied on evidence presented by the plaintiff that demonstrated facts from which the defendant's negligence could be inferred under the usual negligence standard. 359 Mass. at 124. The Burr case is also distinguishable. It involved not the general rationale of foreseeability, but rather a reduced duty of care which was applicable because the plaintiff was an independent contractor engaged to trim defendant's trees that he knew were near the defendant's wires and to whom the defendant owed only the limited duty it owed as employer and landowner, i.e., disclosing hidden defects of which it was or should have been aware. 356 Mass. at 147. See note 4, supra.

legal theories and arguments that were not presented for the trial judge's consideration, see Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975); Kagan v. Levenson, 334 Mass. 100, 106 (1956); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 471 & n.25 (1991); West Broadway Task Force v. Boston Hous. Authy., 414 Mass. 394, 397 n.2 (1993); (b) Massachusetts law has imposed an affirmative duty to warn of latent or inherent dangers only on a few limited categories of defendants, see Davis v. Westwood Group, 420 Mass. at 743 (landowners, as to those whose presence on the property can be reasonably anticipated) Mitchell v. Sky Climber, Inc., 396 Mass. 629, 631 (1986) (product manufacturers, as to foreseeable users of the product); Burr v. Massachusetts Elec. Co., 356 Mass. at 147 (employers, as to their employees and independent contractors), none of which categories apply to MEC vis-a-vis Marcy; and (c) even when an affirmative duty to warn theoretically might be imposed, "[i]f a risk is of such a nature that persons of ordinary intelligence would be aware of it," Davis, supra at 743 n.9, or is "obvious or could be discovered by reasonable inspection," Burr, supra at 147, the defendant is absolved of the duty.

Most fatally, the cases relied on by the plaintiff for a supposed affirmative duty on electric companies to warn of the dangers of electric wiring do not so hold. Compare Clough v. New England Tel. & Tel. Co., 342 Mass. at 35-36 (duty to warn is not imposed per se but only when the electric company "has some reason to suppose that a warning is needed," citing to cases involving landowners and manufacturers); Rasmussen v. Fitchburg Gas & Elec. Light Co., 343 Mass. at 517-519 (noting that "there were no warnings on the poles of the dangerous nature of the wires," but stressing rather that the evidence showed that just such work as the victim had been engaged in when injured by the wires had been done in the past, so that jury questions existed whether the defendant should have reasonably anticipated such activity near its wires and whether it had discharged its consequent "duty to guard against the consequences of such contact"); Burr v. Massachusetts Elec. Co., 356 Mass. at 147 (defendant potentially liable not

because of general duty to warn but because it was a landowner and employer with a limited duty to disclose known hidden defects to those known to go on the premises who were not reasonably aware of them); Resendes v. Boston Edison Co., 38 Mass. App. Ct. 344, 356-357 (1995) (not only was defendant aware of the work that the plaintiff was doing close to its underground lines, but it had already given warnings of the dangers [insufficient, as it turned out], and was under a duty established by the "dig safe" statute, G: L. c. 82, § 42, and previous cases, to mark the location of its underground wires in order to ensure the safety of the area while the work was being done).

Further, whether there is a duty of care is not a jury question, but rather a question of law. Yakubowicz v. Paramount; Pictures Corp., 404 Mass, 624, 629 (1989). Our courts have long acknowledged that electricity is a highly dangerous force and that those transmitting it are obligated "to exercise care that is commensurate with the risk," Clough v. New England Tel. & Tel. Co. 342 Mass. at 35; but they have never imposed a special or heightened duty of care as matter of law on electric companies merely because they transmit potentially dangerous electricity, even in cases involving "a member of the general public.[6]

The proper standard of care is rather the usual one of traditional negligence theory: 'to exercise care that was reasonable in the circumstances, Clough v. New England Tel. & Tel. Co., 342 Mass. at 35; and more particularly, "to exercise ordinary prudence and care in the maintenance and use of its power line." Gelinas, 359 Mass. at 124. As in all negligence cases, satisfaction of the standard depends "on the basis of the facts of each case." Ibid. One such

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[6] Lawler v. General Elec. Co., 1 Mass. App. Ct. 220, 222 (1973), a case involving liability of the electric company as landowner and employer, stated in dictum that electric companies may be held to a "correspondingly high degree of care" in relation to "a member of the general public" regarding its use or transmission of electricity because of electricity's "highly dangerous character.' However, the only authorities cited for that dictum were Gelinas and Rasmussen, supra. Those cases, as described above, do not support the dictum either on their facts or on applicable legal principles. See Gelinas, 359 Mass. at 124; Rasmussen, 343 Mass. at 518-519.

relevant -- but not outcome determinative -- fact having a bearing on the degree of care appropriate, in light of the totality of the circumstances of each case, is the dangerous nature of electricity, so that the requisite prudence and care might differ, depending on the potential severity and likelihood of the risks posed in different circumstances. See ibid.; Kukuruza v. General Elec. Co., 510 F.2d 1208, 1217-1218 (1st Cir. 1975) (applying Massachusetts law); Restatement (Second) of Torts §§ 283 & comment d, 290 & comment e, 291, 293, 298 & comments b & c (1965). Cf. Precourt v. Frederick, 395 Mass. 689, 694-695 (1985) (extent of duty to warn of risks of medical treatment is a varying function of the interplay of the severity of the potential injury and the likelihood that it will occur).

An overview:of the Massachusetts cases previously cited dealing with the scope of the duty owed by electric companies with respect to their transmission lines reveals that it is measured by the classic negligence test of foreseeability: for liability to be imposed, the evidence must show that the defendant was chargeable with such knowledge that it should reasonably have foreseen or anticipated the type of injurious risk that eventuated. See Clough v. New England Tel. & Tel. Co., 342 Mass. at 36; Rasmussen v. Fitchburg Gas & Elec. Light Co., 343 Mass, at 519; Gelinas v. New England Power Co., 359 Mass. at 125, While the issue of foreseeability is ordinarily a question of fact for the jury, Simmons v. Monarch Mach. Tool Co., 413 Mass. 205, 211 (1992), the court may decide the issue as matter of law (a) in the absence of evidence that the risk which resulted in the plaintiff's injury should reasonable have been anticipated by the defendant (i,e., in such a case, the defendant owed no duty to the plaintiff), Glick v. Prince Italian Foods of Saugus, Inc., 25 Mass. App. Ct. 901, 902 (1987); (b) when the risks involved were obvious to persons of average intelligence, Young v. Atlantic Richfield Co., 400 Mass. at 842; and generally (c) when no rational view of the evidence would warrant a finding of negligence. Mullins v. Pine Manor College, 389 Mass. 47, 56 (1983), The decision below is affirmable as matter of law on all three bases.

Even viewing the summary judgment record in the light most favorable to the plaintiff, there was a failure of proof on the plaintiff's part that MEC might reasonably have foreseen that a homeowner would not only use a dangerously conductive aluminum ladder very close to its wires, but would also do so while extending the ladder well above the height of the lowest cables on the utility poles and while attempting to manipulate it on the public sidewalk in front of his house and virtually underneath the wires, rather then locating it on his own property more distant from the poles and wires. This is in stark contrast to all of the cases on which the plaintiff relies, in each of which evidence was brought forward establishing that the electric company knew or should have known of the occurrence or existence near its lines of activities similar to the one that produced the plaintiff's injuries.

In essence, the plaintiff's argument boils down to the proposition that an electric company should anticipate the risk of fatal contact with its lines from the mere presence of nearby residences, Such a rule would, contrary to our law, see Clough v. New England Tel. & Tel. Co., 342 Mass, at 35, effectively make the electric company an insurer. No relevant authority implies, much less reaches, such an extraordinary result, which would be entirely inconsistent with the ordinary principles of negligence that our courts have previously held applicable to electric companies, As an intermediate appellate court, "it is [not] our function[] to alter established rules of law governing principles of substantive liability," Burke v. Toothaker, 1 Mass. App. Ct. 234, 239 (1973)[1] See Commonwealth v. Chase, 42 Mass. App. Ct. 749, 753 (1997).

Judgment affirmed.

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[1] The grounds of our decision make it unnecessary to address MEC's additional argument that its motion was properly granted because the plaintiff had failed to adduce any evidence that MEC's alleged negligence (rather than the ladder users' failure to lower the ladder to a safe height and to heed the safety warnings on the ladder) had proximately caused Marcy's death.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss. SUPERIOR COURT

CHARLOTTE BERGENDAHL Administratrix of the Estate of MARCY M. BERGENDAHL, and CHARLOTTE BERGENDAHL, Individually Plaintiffs v. MASSACHUSETTS ELECTRIC COMPANY, Defendant	)	C. A. No. 94-0655

DEFENDANT, MASSACHUSETTS ELECTRIC COMPANY'S MOTION FOR SUMMARY JUDGMENT

Defendant, Massachusetts Electric Company ("MEC") hereby moves for Summary Judgment under Mass. R. Civ. P. 56 on the grounds that the plaintiff's Complaint states no genuine issue of material fact. Attached as Exhibit A is a copy of the court ruling in which it allows MEC to File Motion for Summary Judgment Outside the Time Permitted by Time Standards. In support of its motion for Summary Judgment, MEC files herewith a memorandum of law.

MASSACHUSETTS ELECTRIC COMPANY
By its attorney,

s/Nicholas J. DeNitto

Allowed
s/Merrick,J.
4/11/97

Nicholas J. DeNitto, Esquire
BBO #120440
25 Research Drive
Westborough, MA 01582
(508) 389-3179

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November, 1996, I served the foregoing Defendant, Massachusetts Electric Company's Motion for Summary Judgment Filed Outside the Time Permitted by

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

TO: Martin J. McNulty, Esquire
84 Nahant Street
Lynn, MA 01902

RE: No. FAR-10300

CHARLOTTE BERGENDAHL & others
vs.
MASSACHUSETTS ELECTRIC COMPANY

NOTICE OF DOCKET ENTRY

Please take note that on February 22, 1999, the following entry was made on the docket of the above-referenced case:

DENIAL of petition to reconsider denial of FAR application.

Jean M. Kennett, Clerk

Dated: February 22, 1999

To: Martin J. McNulty, Esquire
Nicholas J. DeNitto, Esquire

Appendix C.

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Martin J. McNulty, Esquire
84 Nahant Street
Lynn, MA 01902

RE: Docket No. FAR -10300

CHARLOTTE BERGENDAHL & others
vs.
MASSACHUSETTS ELECTRIC COMPANY

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that the above-captioned Application for Further Appellate Review has been considered by the Court and is denied. The Motion to File Late Application is allowed.

Jean M. Kennett, Clerk

Dated: January 25, 1999

To: Martin J. McNulty, Esquire
Nicholas J. DeNitto, Esquire

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

ESSEX,SS. SUPERIOR COURT AT SALEM

C.A. No.: **940655**

CHARLOTTE BERGENDAHL, ADMINISTRATRIX OF THE ESTATE OF MARCY M. BERGENDAHL FOR and CHARLOTTE BERGENDAHL, individually,

PLAINTIFFS,

V

MASSACHUSETTS ELECTRIC COMPANY,

DEFENDANT.

COMPLAINT AND REQUEST

TRIAL BY JURY

DATE: 3/25/94
ORIGINAL FILED IN ESSEX SUPERIOR COURT

COUNT I

1. The Plaintiff,Charlotte Bergendahl, Administratrix of the Estate of Marcy M. Bergendahl, is a resident of Lynn, Essex County, Massachusetts.

2. Charlotte Bergendahl is the mother of Marcy M. Bergendahl, and resides in Lynn, Essex County, Massachusetts.

3. The Defendant, Massachusetts Electric Company, is a Massachusetts Public Utility Corporation which maintains poles and electric wires and otherwise does business in Lynn, Essex County, Massachusetts.

4. On or about August 22, 1992 Marcy M. Bergendahl, 27 years old, was helping her father to move an aluminum ladder that he was using to paint the house; while helping to move the ladder a bolt of electricity left the wire, traveled down the ladder, passed through her body, and caused her death.

5. The Massachusetts. Electric Company breached its duty to the Plaintiff's decedent to exercise ordinary and reasonable care to maintain its wires so as to prevent injury and death.

6. The Defendant was negligent in that it failed to properly maintain its wires, allowed a dangerous situation to exist, and conducted themselves in a negligent manner as follows:

a. Failed to provide their electric wires with insulation.
b. Failed to adequately warn the Plaintiff of the dangerous nature of the electrical wires.
c. Failed to install adequate circuit breakers so as to prevent the Plaintiff's injury and death.
d. Failed to have the wires carrying dangerous loads of electricity installed underground in proper conduits.
e. Failure to warn the Plaintiff that the electricity was able to "jump" or "arc" from the wires and cause damage.
f. Failed to properly distance their wires from both the house and the sidewalk so as to avoid dangerous contact with people.

WHEREFORE, the Plaintiffs Demand compensation and damages in an amount that this Court deems reasonable and just.

COUNT II

7. The Plaintiffs reallege paragraphs 1-6.

8. This Count is brought pursuant to Massachusetts Genera Laws Chapter 229 Section 2, the Massachusetts Wrongful Death Statute .

WHEREFORE, pursuant to Massachusetts General Laws Chapter 229 Section 2 the Plaintiffs seek damages (1) for the fair monetary value of the decedent to the mother, including the value of income, services, protection, care, assistance, society, companionship, comfort, guidance, counsel, and advice. (2) for the reasonable funeral and burial expenses of the decedant and (3) punitive damages.

COUNT III

9. The Plaintiffs reallege paragraphs 1-6.

10. The Plaintiff Charlotte Bergendahl, individually, claims that as a result of the the negligence of the Defendant that she suffered severe emotional distress.

WHEREFORE, the Plaintiff Charlotte Bergendahl seeks damages in an amount that this Court deems reasonable and just.

PLAINTIFFS REQUEST A JURY TRIAL OF ALL ISSUES.

THE PLAINTIFF,
BY THEIR ATTORNEY,
s/Martin J. McNulty

Martin J. McNulty, Esquire
Corner of Ocean & Nahant Sts.
Lynn, Massachusetts 01902
BBO# 544 294
(671) 593-0355

DATED: March 21, 1994

AFFIDAVIT OF KARL BERGENDAHL

Now comes Karl Bergendahl, who under oath avers and states a follows:

1. My name is Karl Bergendahl and I reside at 73 Ashland St. in Lynn, Massachusetts.

2. On or about August 22, 1992 at about 11:00 A.M. I was sitting in the kitchen of my parent's home at 22 Conomo Avenue, Lynn, Mass. with my sister Marcy Bergendahl, who had just arrived for a visit. William Hartman, my sister's fiance, was also present, as was my sister Paulina.

3. About that time my father, Arvid Bergendahl, came into the kitchen from the outside and requested help with the ladder. He was painting the house in preparation for my sister Marcy's wedding shower which was to take place in two weeks.

4. Bill Hartman and I went outside to help my father with the ladder. Marcy stayed in the kitchen with my sister Paulina.

5. My father, Arvid Bergendahl, Bill Hartman, and myself each grabbed the ladder and began to move it. Marcy came out of the kitchen, went to her car, and then came over to where we were working. Marcy was standing next to me and was kidding me about my recent baldness which was caused by cancer treatments that I was taking. She was rubbing the top of my head and laughing when we were electrocuted.

6. Marcy was not involved in any way with the painting of the house, either by way of planning, preparation, or actual work on the house.

7. The time interval between Marcy coming from the car to her standing beside me was less than a minute.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 4TH DAY OF DECEMBER, 1996.

s/Karl Bergendahl

KARL BERGENDAHL

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS. SUPERIOR COURT
C.A. 94-0655 D

CHARLOTTE BERGENDAHL, Administratrix of the Estate of MARCY M. BERGENDAHL, AND CHARLOTTE BERGENDAHL, Individually, Plaintiffs	)	MOTION FOR RECONSIDERATION
v.	)	
MASSACHUSETTS ELECTRIC COMPANY, Defendant.	)	

Now comes the Plaintiff, by her attorney, and moves this Honorable Court to grant her MOTION FOR RULINGS OF LAW AND FINDINGS OF FACT with respect to the allowance of Summary Judgement by Merrick, J., on April 11, 1997 in favor of the Defendant Massachusetts Electric Company.

Respectfully submitted,
Charlotte Bergendahl,
By her attorney

s/Martin J. McNulty

Corner of Ocean & Nahant Sts.
84 Nahant Street
Lynn, Massachusetts 01902
BBO# 544 294

Denied
s/Merrick, J.
5/15/97

Dated: May 3, 1997

A TRUE COPY, ATTEST.
s/Rocio M. Pastor
DEPUTY ASST CLERK

Appendix G.

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.
SUPERIOR COURT

C.A. 94-0655 D

CHARLOTTE BERGENDAHL, Administratrix of the Estate of MARCY M. BERGENDAHL, AND CHARLOTTE BERGENDAHL, Individually, Plaintiffs	MOTION FOR RULINGS OF LAW AND FINDINGS OF FACT
v.	
MASSACHUSETTS ELECTRIC COMPANY, Defendant.	

Now comes the Plaintiff, by her attorney, and moves this Honorable Court to Reconsider the decision of Merrick, J. on April 11, 1997 which allowed the Defendant's Motion For Summary Judgement.

The Plaintiff is aggrieved of this decision in that it is not in accordance with the law.

Respectfully submitted,
Charlotte Bergendahl,
By her attorney

Denied
s/Merrick, J.
5/15/97

s/Martin J. McNulty

Corner of Ocean & Nahant Sts.
84 Nahant Street
Lynn, Massachusetts 01902
BBO# 544 294

Dated: May 3, 1997

A TRUE COPY, ATTEST.
s/Rocio M. Pastor

DEPUTY ASST CLERK

Appendix H.